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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1988

SALVATORE T. "SAM" BUSACCA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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I.

QUESTION PRESENTED FOR REVIEW

Is a jury instruction which permits the jury to consider multiple theories of culpability regarding the actions of an accused charged with violating 29 U.S.C. Sec. 501(c), and thereby allows for a composite theory of guilt, unlawful under the Sixth Amendment's requirement that a unanimous verdict be returned by a jury as to the specific act or acts committed by an accused which constitute the offense charged?

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SALVATORE T. "SAM" BUSACCA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case. That judgment affirmed Petitioner's conviction on sixteen (16) counts of a thirty-nine (39) count indictment for alleged violations concerning the embezzlement of funds from a labor organization, in violation of 29 U.S.C. Sec. 501(c) and 18 U.S.C. Sec. 2 (Count 1); three (3) counts of mail fraud, in violation of 18 U.S.C. Secs. 1341 and 2 (Counts

2, 3 and 6); four (4) counts of embezzling funds from an employee benefit plan, in violation of 18 U.S.C. Secs. 664 and 2 (Counts 17, 18, 21 and 22); one (1) count of accepting a kickback to influence the operations of an employee benefit fund, in violation of 18 U.S.C. Secs. 664 and 2 (Count 23); two (2) counts of making a false statement on a document required to be kept by the Employment Retirement Income Security Act of 1974 (ERISA), in violation of 18 U.S.C. Secs. 1027 and 2 (Counts 30 and 31); one (1) count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. Secs. 1961 and 1962(c) (Count 32); one (1) count of conspiracy to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. Secs. 1961 and 1962(d) (Count 33); and, four (4) counts of filing a false income tax return, in violation of 26 U.S.C. Sec. 7206(1) (Counts 34 through 37).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet reported, but recommended for full text publication, is set forth in Appendix, *infra*, pp. A1 through A13. The Judgment and Commitment Order from the United States District Court for the Northern District of Ohio, Eastern Division, is set forth in Appendix, p. A14.

JURISDICTION

The opinion of the Court of Appeals affirming Petitioner's conviction was filed December 6, 1988, Appendix, *infra*, p. A1.

This Petition seeks review of the judgment of the United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this Petition under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . ."

Title 29 U.S.C. Sec. 501(c) provides:

> "Any person who embezzles, steals, or unlawfully or willfully abstracts and converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than [Ten Thousand Dollars] $10,000 or imprisoned not more than five [5] years, or both."

STATEMENT OF THE CASE

On April 30, 1986, a federal grand jury in the Northern District of Ohio, Eastern Division, returned a thirty-nine (39) count superseding indictment which alleged that Petitioner and unindicted co-conspirator, David E. Kerr (hereinafter referred to as "Kerr") did, on June 11, 1981, "embezzle, steal, abstract and convert assets of Teamster Local 436 in the amount of Two Thousand Four Hundred Sixty-Five Dollars ($2,465.00)", in violation of 29 U.S.C. Sec. 501(c) and 18 U.S.C. Sec. 2 (Count 1); that in May of 1981 and on July 17, 1981, Petitioner, Kerr and indicted co-defendant, Deborah Hanson (hereinafter referred to as "Hanson") "did use the United States mail as an artifice to defraud", in violation of 18 U.S.C. Secs. 1341 and 2 (Counts 2 and 3); that at various times in and between the years 1981 and 1984, Petitioner, Kerr and others "did embezzle, steal, abstract and convert monies of the Teamster Local 436 Welfare Fund", in violation of 18 U.S.C. Secs. 1954 and 2 (Counts 4, 6, 8, 10, 12, 14, 17-22 and 24-26); that at various times in 1982 and 1983, Petitioner, Kerr and Hanson used the United States mail as an artifice to defraud, in violation of 18 U.S.C. Secs. 1341 and 2 (Counts 15 and 16); that at various times between 1981 and 1983, Petitioner, Kerr and Hanson made, or caused to be made, false statements in documents kept as part of the records of the Teamster Local 436 Welfare Fund, in violation of 18 U.S.C. Secs. 1027 and 2 (Counts 27, 28, 29, 30 and 31); that from December 1978 through March 9, 1984, Petitioner conducted and participated in the affairs of Teamster Local 436, an enterprise, through a pattern of racketeering activity, by receiving "kickbacks", in violation of 18 U.S.C. Secs. 1954 and 2, and as alleged in Counts 1 through 26 of the indictment, in violation of 18 U.S.C. Secs. 1961 and 1962(c) (Count

32); that from December 1978 through March 9, 1984, Petitioner and Kerr conspired with each other and with others to violate 18 U.S.C. Sec. 1962(c) by participating in the conduct of Teamster Local 436 through a pattern of racketeering activity which included the offenses alleged in Counts 1 through 26 of the indictment, in violation of 18 U.S.C. Secs. 1961 and 1962(d) (Count 33); that Petitioner underreported his income on his individual income tax return for the calendar years 1979 through 1984, in violation of 26 U.S.C. Sec. 7206(1) (Counts 34, 35, 36, 37, 38 and 39).

Petitioner went to trial on these charges on May 6, 1987 in the United States District Court for the Northern District of Ohio, Eastern Division. On August 21, 1987, the jury returned its verdict in this case. Petitioner was found guilty on sixteen (16) counts of the indictment (Counts 1, 2, 3, 16, 17, 18, 21, 22, 23, 31, 32, 33, 34, 35, 36 and 37). A not guilty verdict was returned against Petitioner on twenty-three (23) counts of the indictment (Counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 24, 25, 26, 27, 28, 29, 30, 38 and 39). Co-defendant Hanson was found guilty on five (5) counts of the fourteen (14) counts for which she was indicted (Counts 14, 15, 16, 24 and 30), and not guilty on nine (9) counts (Counts 2, 3, 4, 5, 27, 28, 29 and 31). Petitioner was sentenced to a total of ten (10) years in prison, and fined Thirty Five Thousand Dollars ($35,000.00). Co-defendant Hanson received probation.

At Petitioner's trial, evidence was produced to establish that the Excavating, Building Material, Construction Drivers, Race Track Employees, Manufacturing, Processing, Assembling and Installer Employees' Local 436 of the International Brotherhood of Teamsters (hereinafter "Local 436") was a labor union

with offices in Cleveland, Ohio; and, that in 1968, Petitioner began working as a business agent for Local 436, and in 1974 became president of Local 436. Evidence relating to Petitioner's alleged culpability on the offenses charged was presented through the plea bargained testimony of Kerr, who had been employed as a business agent of the Local 436 Welfare and Pension Fund since 1962, and was administrator of the Local 436 Welfare and Pension Fund from 1980 through 1984. Kerr was originally indicted alone on the charges embraced in Petitioner's indictment, pled guilty, and subsequently entered an agreement to assist the prosecution in its case against Petitioner.

Evidence was presented in Petitioner's trial that on March 5, 1981, Jethro Robinson died as a result of an accident; that Jethro Robinson had been an independent truck operator and served as a union steward for his employer with Local 436 and, in this capacity, was with Local 436 over thirty (30) years; that on December 30, 1976, Jethro Robinson had been elected to the Board of Directors of the executive board of Local 436; that it was agreed by the Board of Local 436 that the union would make certain contributions to the Local 436 Welfare and Pension Fund on behalf of Jethro Robinson for his distinguished service to the union for over thirty (30) years; and, that the Union minutes of the Board also authorized executive coverage to Jethro Robinson on insurance policies maintained by the Local 436 Welfare and Pension Fund.

Kerr testified at Petitioner's trial that he brought Jethro Robinson's death claim to Deborah Hanson, a clerk for the Local 436 Welfare and Pension Fund, for processing; and, that he gave Ms. Hanson the Certificate of Death and signed the form for death benefits on

Jethro Robinson, which he had personally obtained. Kerr also testified he prepared the beneficiary card for Jethro Robinson, naming Alvin Robinson as beneficiary. In truth of fact, Alvin Robinson was no relation to the deceased, Jethro Robinson, but an employer-contributor to the Local 436 Welfare and Pension Fund who owned United Ready-Mix. Kerr had, in the past, borrowed cash from Alvin Robinson, under the threat that he [Kerr] could stop his business from operating. Kerr met with Alvin Robinson, alone, in Kerr's office and informed him that he [Kerr] wanted Alvin Robinson to sign Jethro Robinson's death claim and cash a Twenty Eight Thousand Dollar ($28,000.00) check from the Occidental Life Insurance Company which named Alvin Robinson as the beneficiary on Jethro Robinson's death claim. In exchange, Alvin Robinson was promised by Kerr that he would not have to make any contributions on behalf of his employees to the Local 436 Welfare and Pension Fund for two (2) years. Alvin Robinson signed the claimant's statement, but subsequently refused to endorse the Twenty Eight Thousand Dollar ($28,000.00) check which Kerr had cashed through his friend, Earl Weiss. It was Kerr's testimony that he gave a portion of this money to Petitioner.

The processing of the payment of Jethro Robinson's death benefit was embraced in Count 1 of the indictment as an alleged violation of 29 U.S.C. Sec. 501(c) and 18 U.S.C. Sec. 2, and was also incorporated as separate offenses in Counts 2, 3 and 31, and as alleged "racketeering activity" in Counts 32 and 33. The proceeds allegedly received by Petitioner from the Jethro Robinson death claim were also incorporated in the alleged income tax violation charged in Count 36.

In requesting specific jury instructions in the District Court regarding Jethro Robinson's "death claim", as charged in Count 1 as an alleged violation of 29 U.S.C. Sec. 501(c), the Government, per its prosecuting attorney, Joseph Wilson, argued multiple theories of culpability as to the actions undertaken by Petitioner:

> MR. CAPLAN: They have charged both and its got to be one.
>
> MR. WILSON: I know what you are driving at and very frankly in this case there are facts from which the jury could find either way.
>
> The jury could find in 1979 the Welfare Fund authorized these contributions for Jethro Robinson, and that the $3,000 [Three Thousand Dollar] contribution, about 2,600 [Two Thousand Six Hundred] of which is Count 1, was authorized. But they could also find that the authorization was either fraudulently obtained, and I think there will be evidence of that, or they could find that this particular expenditure was not subject to the '79 authorization.
>
> And these are going to be heavily argued points, but the point I think we are trying to make is the jury needs to be instructed on both theories in order to be able to make up their mind properly as to whether that statute has been violated.
>
> MR. CAPLAN: The problem with that, Judge, is it means we might never have a unanimous verdict because five [5] might think it's one and seven [7] might think it's another.

Petitioner argued that a "substantial possibility of non-unanimity" was presented in the dichotomous instruction requested by the Government as to alternative theories of guilt based upon different and distinct acts of alleged culpability by Petitioner and

requested that the Government's proposed instruction be rejected in favor of Petitioner's proposed instruction, which would assure unanimity in the verdict. The District Court denied Petitioner's proposed instruction and allowed the Government's requested instruction which permitted the jury to consider multiple theories of guilt and gave no specific instruction as to the required unanimity of the verdict relative to their determination of what Petitioner did to constitute the alleged 29 U.S.C. Sec. 501(c) violation.

On appeal to the Court of Appeals for the Sixth Circuit, Petitioner renewed his argument that the jury instruction given, over objection by Petitioner, precluded unanimity in a verdict returned by a jury as to the specific act or acts found to have been committed by Petitioner to constitute the alleged 29 U.S.C. Sec. 501(c) violation. The Court of Appeals rejected Petitioner's argument and affirmed his conviction.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A JURY INSTRUCTION MAY LAWFULLY BE GIVEN RELATIVE TO AN ALLEGED VIOLATION OF 29 U.S.C. SEC. 501(c) WHICH EMBRACES MULTIPLE THEORIES OF CULPABILITY AND ALLOWS FOR A COMPOSITE THEORY OF GUILT; AND, THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED THIS IMPORTANT QUESTION IN A MANNER INCONSISTENT WITH OTHER CIRCUIT COURTS.

The Sixth Amendment of the United States Constitution guarantees to every accused charged in a federal criminal case the right to demand unanimity in a verdict returned by a jury regarding the specific act or acts which constitute the offenses charged. *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); *United States v. Ryan*, 828 F.2d 1010 (3d Cir. 1987); *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987); *United States v. Payseno*, 782 F.2d 832 (9th Cir. 1986); *United States v. Gibson*, 553 F.2d 453 (5th Cir. 1977).

> "When the [G]overnment chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one [1] of the theories to the satisfaction of the entire jury. It cannot rely on a composite theory of guilt, producing twelve [12] jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict. Conviction by a jury that was not unanimous as to the defendant's specific illegal action is no more justifiable than is a conviction by a jury that is not unanimous on a specific count." *United States v. Beros, supra*, at 462.

In the District Court, Respondent alleged in Count 1 of the indictment that "on or about June 11, 1981" Petitioner, Kerr and others "did embezzle, steal and unlawfully and willfully abstract and convert to their own use and the use of another . . . assets of Teamster Local 436 in the amount of [Two Thousand Four Hundred Sixty-Five Dollars] $2,465.00" in violation of 29 U.S.C. Sec. 501(c) and 18 U.S.C. Sec. 2. The allegations surrounding this offense concerned contributions made by Local 436 on behalf of Jethro Robinson relative to a "death benefit" claim.

Petitioner requested a specific jury instruction which would require the Government to elect between two (2) theories of prosecution thereby assuring unanimity in the verdict. Petitioner argued that 29 U.S.C. Sec. 501(c), as construed by the Sixth Circuit Court of Appeals and all other appellate courts that had considered the issue, could only be brought under one (1) of two (2) theories. One theory involved the unauthorized expenditures or use of property. See: *United States v. Gibson*, 675 F.2d, at 828 (6th Cir. 1982). The other theory involved authorized expenditures or use of property for a wrongful purpose, and embraced additional elements of proof. See: *United States v. Bane*, 583 F.2d 832, at 836 (6th Cir. 1978). Petitioner argued that Respondent's requested instruction involved both theories—authorized and unauthorized use—which embraced alternative criminal acts of proof and, if accepted, there would be no way to determine whether the jury's verdict was unanimous as to specific acts committed by Petitioner. The District Court denied Petitioner's request for a specific instruction which would have required the Government to elect as to one or the other theory of prosecution.

On appeal to the Sixth Circuit Court, Petitioner again argued that the District Court's denial of Petitioner's specific jury instruction allowing Respondent to present multiple theories of guilt unlawfully deprived Petitioner of the required unanimity of the verdict where no specific instruction was given relative to the jury's determination of what Petitioner did to constitute the offense charged. Petitioner argued that unanimity of the verdict required under the Sixth Amendment "requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether a defendant is guilty of a crime charged". *United States v. Gibson, supra,* at 457-58.

Petitioner argued to the Sixth Circuit that the District Court's ruling on this issue was inconsistent with the opinions returned by the Third Circuit Court of Appeals in *United States v. Beros, supra,* and the Ninth Circuit Court of Appeals in *United States v. Payseno, supra,* and *United States v. Marolda,* 615 F.2d 867 (9th Cir. 1980).

In *United States v. Beros, supra,* a union officer was charged on several counts of the indictment with violations of 29 U.S.C. Sec. 501(c) and 18 U.S.C. Sec. 664. In the *Beros* case, as in the case at bar, the appellant argued that because the counts in the indictment each alleged several theories of culpability, the jury should be instructed that "it must unanimously agree upon a particular theory of criminality, and also unanimously agree upon the specific transaction that it believed supported Beros' guilt under that theory." *United States v. Beros, supra,* at 458.

The District Court in the *Beros* case denied the defendant's request for a specific instruction. The Court of Appeals for the Third Circuit reversed the *Beros* conviction, and found:

> "Given the range of possibilities by which the jury could have reached its verdict, and the possibility that individual jurors reasonably could have disagreed as to which act supported guilt, it was necessary that the [D]istrict [C]ourt in this case clearly instruct the jury regarding the required unanimity of its verdict." *Id.* at pg. 458.

In the District Court evidence was presented to suggest that actions undertaken by Petitioner were authorized in the presence of the Local 436 Welfare and Pension Fund regarding Jethro Robinson. However, under the instruction given to the jury, there was no way of knowing how the jury decided on this issue. Petitioner argued to the Sixth Circuit that these facts were similar to those in the case of *United States v. Marolda, supra,* where an indictment charged that a chief executive officer of a local union acted without proper authorization, but under the instruction given to the jury, the union officer could have been convicted under an alternate theory if the Government established that the union funds were authorized but the union officer had no good faith belief that the use of the funds would benefit the union.

The Ninth Circuit reversed *Marolda's* conviction and found:

> "Under the [D]istrict [C]ourt's instructions, however, there is no way of knowing what the jury decided on this issue. By the charge to the jury, the court first dwelt upon the language in the indictment concerning authorization at some length and then

> later treated it as surplusage, effectively telling the jury to disregard it." *United States v. Marolda, supra*, at 870.

Petitioner argued to the Sixth Circuit Court of Appeals that under the instruction given in the present case, the jury was not required to match a finding of guilt "to another unanimous finding regarding a particular act." *United States v. Beros, supra*, at 461. Certain members of the jury could well have considered that the action undertaken by Petitioner was authorized by the union, but Petitioner lacked a good faith belief that the expenditure was to be used for a legitimate benefit of the union. Under the Government's alternate theory of prosecution, other members of the jury could have concluded that the acts undertaken by Petitioner involved unauthorized expenditures of the Board that were fraudulently obtained by Petitioner.

> "In this scenario, the jury would unanimously conclude that there was a mode or manner of violating the law, but there would be no unanimity as to the predicate act. Also, under such a scenario, any verdict would be defective because of the lack of real unanimity." *United States v. Beros, supra*, at 462.

In response, Respondent argued to the Sixth Circuit Court that in prosecuting an alleged violation of 29 U.S.C. Sec. 501(c), it was entirely proper for the Government to allege and argue alternate factual predicate actions to the jury. The Respondent cited no case law authorities to support this position, as none exist.

Respondent further argued that a recent Sixth Circuit Opinion in the case of *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988), did not apply to the facts at bar because the indictment in the present case

charged only one (1) violation. The Sixth Circuit Court of Appeals adopted the position argued by Respondent and held that the rationale in *Beros* and *Duncan* did not apply because Petitioner's case involved only a single alleged violation and created one (1) "generic offense". The Sixth Circuit Court concluded that a general cautionary instruction regarding the unanimity of the verdict was sufficient.

It is Petitioner's position that the opinion entered by the Sixth Circuit Court in this case is contrary to the opinions entered in *United States v. Beros, supra,* and *United States v. Marolda, supra,* regarding the construction of 29 U.S.C. 501(c) and a proper jury instruction to insure unanimity as to an alleged violation of 29 U.S.C. Sec. 501(c). The Sixth Circuit Court's Opinion that the rationale in *Beros, Duncan* and *Marolda* should not apply to the present case because the indictment charged only one (1) violation was inapplicable, where the Respondent presented evidence and advanced arguments concerning multiple theories of culpability regarding the acts of Petitioner which the jury had to consider in rendering its verdict under 29 U.S.C. Sec. 501(c):

> "Given the range of possibilities by which the jury could have reached its verdict, and the possibility that individual jurors reasonably could have disagreed as to which act supported guilt, it was necessary that the [D]istrict [C]ourt in this case clearly instruct the jury regarding the required unanimity of its verdict." *United States v. Beros, supra,* at 458.

Similarly the Sixth Circuit Court's finding that a general unanimity instruction would insure the jury was unanimous on the basis of conviction is inconsistent with the Third Circuit Court's Opinion in *United States v.*

Beros, supra, under a similar factual scenario involving an alleged violation 29 U.S.C. Sec. 501(c). In reversing Petitioner's conviction on the ground of improper jury instruction, the *Beros* Court found:

> "... whether the *potential* for juror confusion existed. We need not, and indeed probably could not in each case, satisfy ourselves that the jury was in fact confused .... When it appears ... that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice.
>
> To correct any potential confusion in such a case, *the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts.*" (Emphasis added). *United States v. Beros, supra*, at 461.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant the Writ of Certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 6, 1988)

RECOMMENDED FOR FULL TEXT PUBLICATION

No. 88-3099

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SALVATORE T. "SAM" BUSACCA,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: ENGEL, *Chief Judge*; BOGGS, *Circuit Judge*; and BALLANTINE, *District Judge*.*

PER CURIAM, Salvatore T. "Sam" Busacca appeals from his conviction on 16 counts of a 39-count indictment. Busacca was convicted of one count of embezzling funds from a labor organization, in violation of 29 U.S.C. §501(c) and 18 U.S.C. §2 (Count 1); three

* The Honorable Thomas A. Ballantine, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

counts of mail fraud, in violation of 18 U.S.C. §§1341 and 2 (Counts 2, 3, and 16); four counts of embezzling funds from an employee benefit plan, in violation of 18 U.S.C. §§664 and 2 (Counts 17, 18, 21, and 22); one count of accepting a kickback to influence the operations of an employee benefit fund, in violation of 18 U.S.C. §§664 and 2 (Count 23); two counts of making a false statement on a document required to be kept by the Employment Retirement Income Security Act of 1974 (ERISA), in violation of 18 U.S.C. 1027 and 2 (Counts 30 and 31); one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§1961 and 1962(c) (Count 32); one count of conspiracy to conduct an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §§1961 and 1962(d) (Count 33); and four counts of filing a false income tax return, in violation of 26 U.S.C. §7206(1) (Counts 34-37). Busacca was sentenced to a total of ten years in prison and fined $35,000.

Busacca objects to two of the trial judge's jury instructions. Upon consideration of Busacca's arguments on appeal, we affirm the convictions.

I

The events that led to Busacca's convictions arose from his actions as the president of the Excavating, Building Material, Construction Drivers, Race Track Employees, Manufacturing, Processing, Assembling, and Installer Employees Local 436 of the International Brotherhood of Teamsters ("the local"). Busacca was also the chairman of the board of trustees of the Local 436 Welfare Fund ("Welfare Fund") and the Local 436 Pension Trust Fund, both of which are governed by the provisions of ERISA. Busacca was indicted and

convicted for using his position of power in the union to obtain kickbacks from merchants wishing to do business with the Welfare Fund. He also filed several false insurance claims with the Welfare Fund. None of the income generated by these activities was reported on his income tax returns.

Busacca bases his appeal on the contention that the district court improperly instructed the jury on the law concerning both the crime of embezzling funds from a labor organization in violation of 29 U.S.C. §501(c) and the crime of embezzling funds from an employee benefit plan in violation of 18 U.S.C. §664.

The alleged embezzlement of labor organization funds concerned an insurance claim filed under the name of Jethro Robinson. Robinson was an independent truck operator and a member of the local. He, however, was not employed by the union or by a contributing employer and, thus, was not eligible for benefits from the Welfare Fund. After Robinson died in an accident on May 5, 1981, Busacca and Local 436 business agent David Kerr, the government's main witness, with the assistance of Deborah Hanson, the Welfare Fund's office manager, decided to file a $28,000 accidental death benefits claim with the Welfare Fund in Robinson's name and split the proceeds. On June 11, 1981, in order to secure retroactive insurance coverage, the local made a contribution of $2,465 to the Welfare Fund on behalf of Robinson. This payment constituted the source of the §501(c) embezzlement charge contained in Count 1 of the indictment.

The alleged embezzlement of employee benefit plan funds involved kickbacks received by Busacca from merchants doing business with the Welfare Fund. Specifically, he was convicted of arranging for a caterer and a T-shirt manufacturer employed by the Fund as suppliers for an anniversary party to overcharge the

Fund and then pay the difference to Busacca and Kerr. Busacca was also convicted of taking such a kickback from a merchant who supplied the Fund with a computer system at an inflated cost.

II

In the review of criminal cases, if no contemporaneous objection was made during trial to an error alleged on appeal, a reviewing court should not reverse the trial court unless there is plain error. *United States v. Young,* 470 U.S. 1, 15-16 (1985). Plain error is defined as an egregious error, one that directly leads to a miscarriage of justice. *Ibid.* If an objection was made at trial, a reviewing court may reverse the trial court only if there is an abuse of discretion. *United States v. Beros,* 833 F.2d 455, 458 n.3 (3rd Cir. 1987). The trial court is "vested with broad discretion in formulating its charge and will not be reversed unless the charge fails accurately to reflect the law." *United States v. Pruitt,* 763 F.2d 1256, 1261 (11th Cir. 1985), *cert. denied,* 474 U.S. 1084 (1986).

The parties disagree as to whether the appellant made a proper objection to the first jury instruction challenged in this appeal. A proper objection to a jury instruction is made when the subject of the objection and its grounds were identified with sufficient precision to give the district court a full understanding of its nature. *United States v. Eiland,* 741 F.2d 738, 742 (5th Cir. 1984). An objection to the omission of a charge can have the same effect as a request for the charge. *Ibid.*

The instruction at issue dealt with the charge contained in Count I of the indictment. This charge involved the embezzling of funds from a labor organization. This circuit has held that this crime can be proved through either of two theories. The embezzling of

the funds, under the first theory, is an unauthorized taking from the labor organization. Under the second theory, the labor organization authorizes the expenditures, but it receives no benefit. Busacca maintains that the government can proceed under only one of these theories in any one prosecution in order to ensure that the jury agrees unanimously on exactly what crime was committed.

In our opinion, it is clear that Busacca made a proper objection to the jury charge. Busacca's trial counsel argued several times that the judge should instruct on only one theory of the crime in question, and the trial court should make the government choose which theory it wished to proceed under in order to ensure a unanimous verdict. At one point, the appellant's counsel stated, after the prosecutor explained why it requested the instruction at issue, "The problem with that, Judge, is it means we might never have a unanimous verdict because five might think it's one and seven might think it's another." At another point, appellant's counsel continued his argument, "I mean we have an impossible conflict, your Honor, in terms of instructions, because at some point in time this jury has to be told unanimously that they are going to have to decide it was authorized or unauthorized."

The government claims, on the other hand, that the appellant never asked for a specific jury instruction and, thus, waived his objection. In light of the law set out in cases such as *Eiland*, this argument cannot be maintained. The standard of review, then, for Busacca's first allegation of error is whether the district court abused its discretion. The appellant admits that he did not object at trial to the second jury instruction challenged, making the standard of review as to that allegation one of plain error.

III

The first allegation of error concerns the appellant's conviction on Count 1 of the indictment. This charge involved Busacca's procuring $2,465 from the local as a contribution to the Welfare Fund in the name of Jethro Robinson in violation of 29 U.S.C. §501(c). The appellant contends that the trial judge erred in instructing the jury that they could find the defendant guilty of violating 29 U.S.C. §501(c)[1] if they believed the defendant was guilty under either of two theories of liability. These two theories were explained in *United States v. Bane*, 583 F.2d 832, 835 (6th Cir. 1978), *cert. den.*, 439 U.S. 1127 (1970). Under one theory, the union authorizes expenditures or use of property by the defendant, but the funds are not used for the benefit of the union. Under the other theory, the expenditures are wholly unauthorized. A union official or employee can be convicted of violating §501(c) under an unauthorized expenditure theory if it can be shown that the expenditure was not authorized and the defendant acted with fraudulent intent to obtain the expenditure. *United States v. Gibson*, 675 F.2d 825, 828-29 (6th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982). A §501(c) conviction can be obtained under an authorized expenditure theory if the government proves that, first, the defendant had a fraudulent intent to deprive the union of its funds, and, second, that the defendant lacked a good faith belief that the expenditure was for the legitimate benefit of the union. *Bane*, 583 F.2d at 835-36.

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[1] 29 U.S.C. §501(c) states that, "Any person who embezzles, steals, or unlawfully and willfully abstracts and converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The trial judge in the case *sub judice* instructed the jury on these two theories. He first instructed them on the basic elements of the crime, telling them that they must find that there was a union, that the defendant was a union official or employee, that the defendant embezzled union property, and that the defendant had a fraudulent intent to deprive the union of its property. He then instructed them that they must determine if an expenditure was authorized or unauthorized. If they found the expenditure unauthorized, they were to go no further; a conviction was in order.

However, the judge told them, if "you further find that the Government has failed to prove, beyond a reasonable doubt, that such expenditures was [sic] unauthorized, then in order to find Mr. Busacca guilty of the offense charged in Count I of the indictment the Government has the burden of proving each of the additional essential elements of that offense by proof beyond a reasonable doubt: *ONE*: a fraudulent intent by Mr. Busacca to deprive Teamsters Local Union 436 of its funds; and *TWO*: a lack of good faith belief by the defendant that the expenditure was for the legitimate benefit of the union." Thus, the jury was, in essence, instructed that if, after finding that the prosecution has proved the essential elements of the offense, they found the union authorized the expenditure in question, they had to find, in addition to the other elements of the crime, that the defendant did not believe that the expenditure was for the benefit of the union.

The appellant argues that the trial judge erred in giving this instruction because it created the possibility of a non-unanimous verdict. Busacca contends that the jury could have disagreed as to whether an expenditure was authorized or unauthorized and simply decided to convict even though they did not agree on the specific

theory of culpability. The appellant acknowledges that the trial judge did give a general instruction that unanimity was required on all findings[2], but insists that the general instruction was insufficient in this case. As he did at trial, the appellant argues that the government ought to have been required to choose one theory under which to prosecute. Alternatively, the judge could have specifically instructed the jury that they had to unanimously agree on what type of §501(c) crime the appellant committed.

It is well settled that in routine cases, a general unanimity instruction will be sufficient to ensure that the jury reaches its verdict properly. *Beros*, 833 F.2d at 140. However, when there exists a genuine possibility that either: (1) the jury will be confused because of the complexity of the case; or (2) a conviction will occur as a result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. *Id.* at 461.

The appellant contends that this case requires specific unanimity instructions because the different jurors could have decided to convict Busacca on the basis of different theories of the crime charged. Busacca relies on *Beros* for support of his position. In that case, the Third Circuit overturned a §501(c) conviction because a specific unanimity instruction was not given where the allegations made in support of the various counts of the indictment consisted of several acts of the defendant, any one of which could have led to his conviction. For example, in one count of the indictment, Beros was charged with embezzling union funds in the course of a

[2] The judge instructed, "Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous."

business trip to Florida. Beros was accused, in the course of that trip, of using his union credit card for personal expenses; occupying an overly expensive hotel room; and staying more days than the business required. *Id.* at 460. Any one of these acts, had the jury found the defendant had committed them, would have been sufficient to support the embezzling charge. *Ibid.*

The court concluded that in this kind of case the jury had to be instructed specifically that they must agree unanimously as to what act they found the defendant to have committed. *Id.* at 458. Otherwise one could very well be confronted with a situation in which some jurors found the defendant embezzled when he used the union credit card and others when he obtained the expensive hotel room. The *Beros* court concluded; "[A jury] cannot rely on a composite theory of guilt, producing twelve jurors who unanimously thought that the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict. Conviction by the jury that was not unanimous as the defendant's specific illegal action is no more justifiable than is a conviction by a jury that is not unanimous on the specific count." *Id.* at 462.

The Sixth Circuit approved this analysis in *United States v. Duncan*, 850 F.2d 1104, 1112 (6th Cir. 1988). That case involved a defendant accused of making false statements on his 1982 tax return. The government alleged that the tax return contained two distinct false statements, either one of which, if the jury agreed with the prosecution, could have led to his conviction. *Id.* at 1105. The court held the jury must be instructed specifically that they must agree unanimously on which false statement the defendant had made. *Ibid.*

The appellant contends that the present case is analogous to *Beros* and *Duncan* in that he could have been convicted under differing theories of the crime, making it possible that the jury did not agree unanimously on which theory Busacca should be convicted. We hold that *Beros* and *Duncan* are not at all like this case. Those cases require the jury to agree unanimously on which *acts* the defendant committed, for it was not clear in those cases exactly what the defendant was being punished for. Here there is no ambiguity as to the nature of the act; it is the obtaining of the union contribution for Robinson's death benefits insurance. It is also clear what the appellant is accused of; embezzling money from the union. The only thing at issue is what theory will be used to prove the appellant guilty.

The resolution of this issue does not lead to any danger of a non-unanimous verdict, for the instructions in this case, rather than causing confusion as in *Beros*, are quite clear. The judge instructed the jury that they must determine if the expenditure in question was authorized or unauthorized. Assuming the other elements of the crime are present, if the expenditure was unauthorized the defendant is guilty. If the jury finds that the expenditure in question was authorized, the government must prove an extra element. The judge instructed the jury that all these decisions must be made unanimously. Hence, there is no danger of confusion. A reviewing court must presume that the jury followed the judge's instructions. *Steele v. Taylor*, 684 F.2d 1193, 1205 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983).

We employed a similar analysis in *United States v. McPherson*, 782 F.2d 66, 68 (6th Cir. 1986). This case involved a conviction under 18 U.S.C. §656, a statute

quite similar to §501(c), which makes it a crime for a bank employee to "embezzle, abstract, purloin, or willfully misapply any of the moneys, funds, assets, or securities intrusted to the custody or care of such bank." The defendant in that case argued that it was plain error for the trial judge not to have instructed the jury that they were required to agree upon what method the defendant employed to violate the statute, i.e., whether he embezzled, abstracted, purloined, or willfully misapplied the funds in question. *Id.* at 67. We ruled that a specific instruction was unnecessary because the statute in question created one "generic offense", the taking of money from the bank, that can be committed in several alternative ways. The court concluded that "if the jury was unanimous in finding beyond a reasonable doubt that a defendant bank employee committed an act that constituted a willful taking of the bank's funds, regardless of the precise manner in which the taking occurred, the verdict would be valid." *Id.* at 68; *See United States v. Bouquett,* 820 F.2d 165 (6th Cir. 1987); *United States v. McGuire,* 744 F.2d 1197 (6th Cir. 1984), *cert. den.,* 471 U.S. 1004 (1985).

Thus, we conclude that §501(c) also creates one generic offense, stealing money from a union, that can be proven in two different ways. Following *McPherson,* what is crucial is that the jury found that the local's contribution in behalf of Robinson was an illegal taking. Which theory the jury used, meaning whether or not the jury thought the contribution was authorized, is of little concern.

IV

Following his arguments on the jury instructions for Count 1, the appellant challenges his convictions on Counts 17, 18, 21 and 23 on the grounds that the judge should have given specific unanimity instructions on the charges. The counts in question concern the violation of 18 U.S.C. §664, which punishes "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another" the property of any employee welfare benefit plan or employee pension benefit plan. The appellant contends that the trial court committed plain error in not instructing the jury that they had to agree unanimously as to what method the defendant used to violate the statute, restating the same arguments made on the challenge to Count 1.

We must again refer to *McPherson*, noting that the statute involved in that case, prohibiting the theft of bank funds, is almost identical to the statute at issue here. Thus, this offense is yet another generic offense, making a specific instruction unnecessary. In addition, as with the labor organization embezzlement charge, the judge in the present case did instruct the jury that the government had to prove beyond a reasonable doubt that the appellant had violated the statute by using one of the methods listed in the statute. Since the judge instructed them that all their decisions, including the one above, had to be made unanimously, specific instructions were not required.

V

Finally, the appellant contends that his convictions are suspect because the jury's verdict was inconsistent. Busacca bases this charge of inconsistency on the fact that while he was convicted on 16 counts, he was acquitted on 23, even though the same witnesses, particularly Kerr, testified to all the charges. This court has held that consistency in separate counts is not required in jury verdicts. *United States v. Bevins,* 430 F.2d 601, 603 (6th Cir. 1970). The possibility that a verdict might be the result of a compromise, mistake, or lenity should not be allowed to upset a jury verdict. *Ibid.* Busacca offers no reasons why this rule should not apply in this case. The appellant's convictions are AFFIRMED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed January 28, 1988)

Case Number: CR86-81

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO, EAST. DIVN.

UNITED STATES OF AMERICA,

v.

SALVATORE "SAM" T. BUSACCA,
6383 Longridge Rd.,
Mayfield Hts., OH 44124.

JUDGMENT IN A CRIMINAL CASE

ALAN P. CAPLAN
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[[ ] guilty [ ] nolo contendere] as to count(s) _____, and
[x] not guilty as to count(s) 1-39.

By: JAMES D. MCMANN
(Illegible)

THERE WAS A:

[[ ] finding [x] verdict] of guilty as to count(s) 1, 2, 3, 16, 17, 18, 21, 22, 23, 31, 32, 33, 34, 35, 36 & 37.

THERE WAS A:

[[ ] finding [x] verdict] of not guilty as to count(s) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 24, 25, 26, 27, 28, 29, 30, 38 and 39.

The defendant is acquitted and discharged as to these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Conducting the affairs of an enterprise through a pattern of racketeering activity (T. 18 Sec. 1962(c); RICO conspiracy (18 §1962(d));

Theft and embezzlement from benefit plan (18 § 664); Submission of false forms to benefit plan (18 §1027); Payment to influence benefit plan (18 §1954); Mail fraud (18 §1341); Theft and embezzlement from union funds (29 §501(c)); Submission of false income tax returns (26 §7206(1)); aiding and abetting (18 §2).

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the Attorney General for a period of 5 yrs. on count 1, 2 yrs. each on counts 2, 3 & 16 to run concurrent with each other and with count 1; 2 yrs. each on counts 17, 18, 21 & 22 to run concurrent with each other but consecutive to sentences imposed on counts 1, 2, 3 & 16; 3 yrs. on counts 23 & 31 to run concurrent with the above sentences; 3 yrs. on count 32 to run consecutive to the above sentences; 3 yrs. on count 33 to run concurrent with sentence imposed on count 32; 3 yrs. each on counts 34, 35, 36, & 37 to run concurrent with the above. Total sentence imposed TEN (10) YEARS. Defendant is fined the following amounts: count 1—$10,000; count 2—$1,000; count 3—$1,000; count 16—$1,000; count

17—$1,000; count 18—$1,000; count 21—$1,000; count 22—$1,000; count 23—$2,000; count 31—$2,000; count 32—$5,000; count 33—$5,000; count 34—$1,000; count 35—$1,000; count 36—$1,000; count 37—$1,000. Total fine imposed $35,000.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum

probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $_____ pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[ ] The Court orders commitment to the custody of the Attorney General and recommends:

January 22, 1988
Date of Imposition of Sentence

GEORGE W. WHITE
Signature of Judicial Officer

George W. White, U.S. Dist. Judge
Name and Title of Judicial Officer

January 22, 1988
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
Date

at _____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 6, 1988)

No. 88-3099

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SALVATORE T. "SAM" BUSACCA,
Defendant-Appellant.

Before: ENGEL, *Chief Judge*; BOGGS, *Circuit Judge*; and BALLANTINE, *District Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN,
Clerk

Issued as Mandate: December 29, 1988

Attest:

/s/ GEORGE MCCARTHY
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1253

In the Supreme Court of the United States

OCTOBER TERM, 1988

SALVATORE T. "SAM" BUSACCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the jury instructions at petitioner's trial created the possibility of a non-unanimous verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1253

SALVATORE T. "SAM" BUSACCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 863 F.2d 433.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1988. The petition for a writ of certiorari was filed on January 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of embezzling funds from a labor organiza-

tion, in violation of 29 U.S.C. 501(c) (Count 1); three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 2, 3, and 16); four counts of embezzling funds from an employee benefit plan, in violation of 18 U.S.C. 664 (Counts 17, 18, 21, and 22); one count of accepting a kickback to influence the operations of an employee benefit plan, in violation of 18 U.S.C. 664 (Count 23); two counts of making a false statement on a document required to be kept by the Employment Retirement Income Security Act of 1974 (ERISA), in violation of 18 U.S.C. 1027 (Counts 30 and 31); one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 32); one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 33); and four counts of filing a false income tax return, in violation of 26 U.S.C. 7206(1) (Counts 34-37). He was sentenced to an aggregate term of ten years' imprisonment and was fined $35,000. The court of appeals affirmed (Pet. App. A1-A13).[1]

1. The evidence at trial is summarized in the court of appeals' opinion (Pet. App. A2-A4). It showed that petitioner was the president of the Excavating, Building Material, Construction Drivers, Race Track Employees, Manufacturing, Processing, Assembling, and Installer Employees Local 436 of the International Brotherhood of Teamsters (Local 436). He was also the chairman of the board of trustees of the Local 436 Welfare Fund and the Local 436 Pension Trust Fund.

In 1981, Jethro Robinson, an independent trucker, died in an accident. Although he was a member of Local 436, Robinson was not entitled to death benefits from the Welfare Fund. Nevertheless, petitioner and his confeder-

[1] Petitioner was acquitted on 23 counts of the 39-count indictment.

ates decided to submit a fraudulent $28,000 claim to the Welfare Fund for accidental death benefits on Robinson's behalf. They also agreed to split the proceeds from that claim. To make it appear as if Robinson were entitled to a death benefit from the Welfare Fund, petitioner caused the Local to make a $2,465 payment to the Welfare Fund on Robinson's behalf. As a result of that payment, petitioner was charged with embezzlement from a labor organization. Pet. App. A2-A3.

Petitioner also arranged to receive kickbacks from merchants who did business with the Welfare Fund. In particular, petitioner demanded that the merchants charge the Welfare Fund excessive fees for goods and services and remit the difference to him and one of his confederates. That scheme formed the basis for the charge of embezzlement from an employee benefit plan. Pet. App. A3-A4.

At trial, the district court instructed the jury that there were two theories under which petitioner could be convicted of embezzling funds from a labor organization. The court first advised the jury of the elements common to both theories: that there was a union; that petitioner was a union official or employee; that petitioner embezzled union property; and that petitioner had a fraudulent intent to deprive the union of its property. The court then instructed the jurors that they must determine whether the expenditure by the union was unauthorized; if the jurors found the expenditure to be unauthorized, they were to go no further. If, on the other hand, the jury found that the government had not proved the expenditure to be unauthorized, the trial court explained that "in order to find [petitioner] guilty of the offense charged in Count I of the indictment the Government has the burden of proving each of the additional essential elements of that offense by proof beyond a reasonable doubt: *ONE*: a fraudulent intent by [petitioner] to deprive Teamsters Local Union 436

of its funds; and *TWO*: a lack of good faith belief by the [petitioner] that the expenditure was for the legitimate benefit of the union." Pet. App. A7. The court also instructed the jury that its verdict had to be unanimous (*id.* at A8 & n.2).

2. The court of appeals affirmed (Pet. App. A1-A13), rejecting petitioner's claim that the trial court's instructions created the prospect of a non-unanimous verdict. The court explained that "in routine cases, a general unanimity instruction will be sufficient to ensure that the jury reaches its verdict properly" (*id.* at A8). In this case, the court of appeals concluded, the trial court's unanimity instruction was sufficient. Moreover, the court stated, the instructions on the elements of embezzlement could not have confused the jury, since the instructions made it clear that the jury was to consider the elements of an authorized expenditure only if it first concluded that the government had failed to prove an unauthorized expenditure beyond a reasonable doubt (*id.* at A10). The court also noted (*id.* at A11) that the statute at issue, 29 U.S.C. 501(c), "creates one generic offense, stealing money from a union, that can be proven in two different ways," and that by convicting petitioner the jury had unanimously agreed that he had stolen money from Local 436.[2]

ARGUMENT

Petitioner contends (Pet. 12-18) that the district court's instructions on the elements of embezzlement from a labor organization created the possibility of a non-unanimous verdict. There is no merit to that claim.

[2] In addition, the court of appeals rejected petitioner's challenge to the trial court's instructions on the elements of embezzlement from an employee benefit plan (Pet. App. A12). It also rejected petitioner's assertion that the verdicts were fatally inconsistent (*id.* at A13). Those claims are not presented in the petition.

In routine cases, a general instruction that the jury must agree unanimously on its verdict is sufficient to ensure jury unanimity. See *United States* v. *Ryan*, 828 F.2d 1010, 1019-1020 (3d Cir. 1987); *United States* v. *Williams*, 737 F.2d 594, 613-614 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *United States* v. *McClure*, 734 F.2d 484, 494 (10th Cir. 1984); *United States* v. *Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983); *United States* v. *Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982); *United States* v. *Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976). Here, the district court told the jury that "[a]ny verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous." Pet. App. A8 n.2. That instruction was entirely sufficient.

Petitioner is mistaken in suggesting that the embezzlement instruction permitted the jury to divide its votes among the two available theories. Rather, as the court of appeals explained (Pet. App. A7, A10), the jury was instructed to address the two theories sequentially. Only if it failed to accept the government's proof that the expenditure was unauthorized was the jury to consider the proof of authorized, but fraudulent expenditure. There was therefore no risk that the instructions produced a non-unanimous verdict.

The Third Circuit's decision in *United States* v. *Beros*, 833 F.2d 455 (1987), is easily distinguishable. In *Beros*, the court of appeals reversed the defendant's conviction because each of several counts of the indictment alleged multiple acts in violation of Section 501(c). The court concluded that the defendant may therefore have been convicted without a unanimous determination that he committed any particular act in violation of the statute. By contrast, the instructions in this case directed the jury to

consider the second theory of liability only if it was unable unanimously to convict petitioner on the first theory. Thus, in this case, unlike in *Beros,* there was no risk that the jury convicted based on "a composite theory of guilt" (*Beros,* 833 F.2d at 462).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney

MARCH 1989

[3] Petitioner's reliance on *United States* v. *Marolda,* 615 F.2d 867 (9th Cir. 1980), is entirely misplaced. In that case, the court of appeals held that the instructions at trial impermissibly varied from the charges contained in the indictment. The court did not hold that the instructions created a possibility of a non-unanimous verdict.

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